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No. 04-108

In The Supreme Court of the United States

SUSETTE KELO, et al.,

Petitioners,

v.

CITY OF NEW LONDON, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Connecticut

BRIEF OF THE STATE OF CONNECTICUT, THROUGH ITS ATTORNEY GENERAL RICHARD BLUMENTHAL, AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

RICHARD BLUMENTHAL
Attorney General of
Connecticut

*ROBERT D. SNOOK
Assistant Attorney General
Office of the Attorney
General of Connecticut
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5020

Counsel of Record

Counsel for the State of Connecticut as Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Fifth Amendment prohibit a state legislature from allowing municipal authorities to condemn private residences in a distressed municipality for the purpose of furthering a community economic development plan that is projected to create jobs, increase tax revenues and revitalize downtown and waterfront areas?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE CONDEMNATION AT ISSUE IN THIS CASE IS A VITAL COMPONENT OF A BROADER EFFORT BY THE STATE TO PROMOTE ECONOMIC REVITALIZATION OF DISTRESSED COMMUNITIES	3
II. THE USE OF PRIVATE ACTORS TO ACCOMPLISH PUBLIC GOALS IS WELL ESTABLISHED IN THE LAW OF EMINENT DOMAIN	8
CONCLUSION	15

TABLE OF AUTHORITIES

	Page
CASES	
Berman v. Parker, 348 U.S. 26 (1954)	8, 11, 12
Guam v. Moylan, 407 F.2d 567 (9th Cir. 1969)	10
Hairston v. Danvill & Western Railway, 208 U.S. 598 (1908)	11
Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984)	11, 12
Kelo v. City of New London, 843 A.2d 500 (Conn. 2004)	3, 4, 6
Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923)	10
Welch v. Tennessee Valley Authority, 108 F.2d 95 (6th Cir. 1939)	8
STATUTES	
Conn. Gen. Stat. § 8-186	*passim*
Conn. Gen. Stat. § 8-189	4, 5
Conn. Gen. Stat. § 8-191	5
Conn. Gen. Stat. §§ 22a-1, *et seq.*	5
OTHER AUTHORITIES	
Blackstone, Commentaries on the Laws of England, Vol. 1, p. 135 (1765)	8, 9
The Federalist No. 10 (J. Madison) (Hamilton ed. 1868)	10
Nichols on Eminent Domain § 7.01[3], (3rd ed. 2004)	9

INTEREST OF *AMICUS CURIAE*

The State of Connecticut, through its Attorney General, Richard Blumenthal, respectfully submits this brief as *amicus curiae* in support of the City of New London and the other respondents.

The State of Connecticut has a unique and significant interest in this case because the power of eminent domain that the petitioners are challenging is set forth in a Connecticut statute – Conn. Gen. Stat. § 8-186. Although this litigation involves a particular development project in New London, Connecticut, the constitutionality of the condemnation authority embodied in § 8-186 is of vital concern to the State as a whole because it is a key element of the State's effort to promote economic revitalization statewide.

Specifically, Conn. Gen. Stat. § 8-186 states that "[i]t is found and declared that the economic welfare of the state depends upon the continued growth of industry and business within the state." It further states that "assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants" is a valid "public use" as a "matter of legislative determination." *Id*. Reflected in this statutory language is the State of Connecticut's interest in myriad projects and challenges faced by the State and the 169 municipalities within the State, including the City of New London. If the Court were to adopt the petitioners' position, the State of Connecticut and the municipalities to which the State has delegated its eminent domain power would find their hands tied by litigation, or the threat of litigation, that would seriously hamper their efforts to promote economic development and prosperity within the State.

Accordingly, the State of Connecticut, as *amicus curiae*, respectfully urges this Court to uphold the constitutionality of the condemnation authority set forth in Conn. Gen. Stat. § 8-186 by affirming the decision of the Connecticut Supreme Court.

SUMMARY OF ARGUMENT

In challenging the City of New London's condemnation of their property, the petitioners are challenging far more than a single decision of one municipality. In effect, they are challenging Connecticut's statutory scheme for addressing the deep-seated economic problems of distressed municipalities across the State and, in particular, the General Assembly's determination that "assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants" is a valid "public use" as a "matter of legislative determination." Conn. Gen. Stat. § 8-186. Because such determinations are properly the province of the legislature, not the judiciary, the petitioners' challenge is fundamentally unfounded.

Furthermore, the means employed by New London to carry out its state-sanctioned economic development plan are not novel. On the contrary, the common law of eminent domain has long recognized that private actors may be used to accomplish public goals. Thus, the petitioners' claim that the condemnation at issue in this case represents a new and troubling expansion of the law should be squarely rejected.

ARGUMENT

I. THE CONDEMNATION AT ISSUE IN THIS CASE IS A VITAL COMPONENT OF A BROADER EFFORT BY THE STATE TO PROMOTE ECONOMIC REVITALIZATION OF DISTRESSED COMMUNITIES.

The petitioners portray the condemnation at issue in this case as the cavalier act of a rogue municipality. Nothing could be further from the truth. As the history of this case demonstrates, the subject condemnation is one component of the City of New London's carefully conceived economic development plan, which in turn is the product of a broad effort by the State to promote the revitalization of communities that have been devastated by economic downturns.

Often, as in the present case, local economic downturns are the result of national and international forces far beyond the control of local governments. For example, the federal government's decision in 1996 to close the United States Naval Undersea Warfare Center in New London resulted in the loss to the City of over 1000 jobs. *Kelo v. City of New London*, 843 A.2d 500, 509 (Conn. 2004). To address such problems, the State is working with municipalities such as New London to develop plans to promote revitalization of the local economy. Given the reality that dependence on local taxation and state revenues often cannot solve the problem, economic development plans that incorporate both public and private entities offer a promising option that, in some cases, may be the only viable solution to chronic economic decline.

This is precisely the situation in New London. New London is a city that, like many cities in the State and

across the country, has suffered significant economic reverses, in large part due to forces beyond its control. (Pet. App. 196, 272-73, 327).[1] Much of its business and industry has declined over the last several decades and its tax base has appreciably eroded. The local situation has deteriorated to the point that the State has reviewed the situation and the Connecticut Office of Policy and Management ("OPM") has repeatedly designated the city a "distressed municipality." *Kelo v. City of New London*, 843 A.2d 500, 509 (Conn. 2004). This designation allows the city to address its problems pursuant to the provisions of Connecticut General Statutes §§ 8-186, *et seq*.

The General Assembly adopted Conn. Gen. Stat. §§ 8-186, *et seq*. more than thirty years ago to address the crippling economic conditions of distressed municipalities. In pertinent part, this statutory scheme authorizes the establishment of economic development agencies or development commissions specifically to develop comprehensive economic development plans, particularly for distressed municipalities such as New London. (Pet. App. 272-73).

Once a development agency or commission has been given instructions to proceed by the municipal authorities, it must initiate a project plan that, by law, must include a clear legal description of the land within the designated development area, plans for relocating affected residents, financing plans, etc. Conn. Gen. Stat. § 8-189. After relevant state agencies have determined that the proposed plan does not vary from state planning

[1] References to the Appendix to the Petition for a Writ of Certiorari are noted as "Pet. App."

program objectives, the development agency must then present the plan to the municipal authorities, and provide appropriate notice for a mandatory public hearing, before these authorities vote to approve or disapprove the plan. Conn. Gen. Stat. §§ 8-189, 191.

In February, 1998, Pfizer, Inc. publicly announced its plans to develop a major research facility on the New London Mills site adjacent to the Fort Trumbull area of New London, Connecticut. (Pet. App. 4). In April, 1998, the New London City Council ("City") authorized a development plan for the Fort Trumbull area pursuant to its authority under Conn. Gen. Stat. § 8-186, *et seq*. (*Id.*)

Soon after receiving the initial go-ahead from the City under Conn. Gen. Stat. § 8-186, the New London Development Corporation ("NLDC"), a private, nonprofit economic development corporation formed by the City in 1978 to assist in economic planning, began holding informal neighborhood meetings regarding the development plan. (Pet. App. 3). In May, 1998, the City authorized the NLDC to proceed.

In July, 1998, the NLDC began to prepare an environmental impact statement, required under the Connecticut Environmental Policy Act, Conn. Gen. Stat. § 22a-1, *et seq*. The NLDC considered six alternative plans for the project area as part of the required environmental impact evaluation. (Pet. App. 7).

The NLDC's development plan area is approximately ninety acres in size and is located on the Thames River in New London, adjacent to the proposed Fort Trumbull State Park, and the Pfizer global research facility, which opened in June, 2001. It includes residential and commercial areas, and is comprised of approximately 115 land

parcels. *Kelo v. City of New London*, 843 A.2d 500, 509 (Conn. 2004).

The project's goals are to create a development that would complement the Pfizer facility and create jobs, increase tax and other revenues, encourage public access to and use of the City's waterfront, and eventually "build momentum" for the revitalization of the rest of the City, including its downtown area. *Kelo*, 843 A.2d at 509.

The development plan itself is divided into seven parcels of land. Parcel 1 will include a waterfront hotel and conference center, along with marinas for both transient tourist boaters, and commercial fishing vessels. Parcel 1 also will include a public walkway along the waterfront. Parcel 2 will provide for approximately eighty new residences, organized into an urban neighborhood and linked by a public walkway to the remainder of the development plan, including the Fort Trumbull State Park. Space will be reserved at the southern end of parcel 2 for the United States Coast Guard Museum, which will be moved to the development plan area from the nearby United States Coast Guard Academy. Parcel 3 would have 90,000 square feet of high technology research space adjacent to the Pfizer facility, but would also retain the existing Italian Dramatic Club, a private social club. Parcel 3 includes private residences currently owned by three of the plaintiffs. Finally, parcel 4A, which includes homes owned by four plaintiffs, would be designated for "park support" services and parking for the nearby state park. *Kelo*, 843 A.2d at 509.

When it approved the development plan in January, 2000, the City Council also authorized the NLDC to acquire properties within the development area. Thereafter, in

October, 2000, the NLDC voted to use the power of eminent domain to acquire properties within the development area whose owners had not been willing to sell them. All acquisitions were initiated pursuant to Conn. Gen. Stat. § 8-186.

Once acquired, the project area will be owned by the NLDC, which will then lease the land for $1 a year to Corcoran Jennison, a private, for-profit development company. Corcoran Jennison would then undertake the economic development of the area as described above.

The development plan is expected to generate approximately between: (1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs. The composite parcels of the development plan also are expected to generate between $680,544 and $1,249,843 in property tax revenues for the City, in which 54% of the land area is exempt from property taxes. These gains would occur in a city that, with the exception of the new Pfizer facility adjacent to the development plan area that now employs approximately 2000 people, recently has experienced serious employment declines, particularly with the loss of approximately 1900 government sector positions and, as noted above, the closure of the United States Naval Undersea Warfare Center in 1996, which transferred more than 1000 positions to Newport, Rhode Island. *Kelo*, 843 A.2d at 509.

In short, the condemnation at issue in this case is not a lone decision by one municipality, but rather the product of careful legislative decisionmaking by the State legislature and the City of New London. It reflects a concerted effort by State and local government officials to address problems that are, in large part, caused by forces beyond

the City's control and require comprehensive solutions. Because "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation," *Berman v. Parker*, 348 U.S. 26, 36 (1954), there is no basis for upsetting the legislative determinations at issue in this case. As this Court has emphasized, "[t]his principle admits of no exception merely because the power of eminent domain is involved," *id.*, and no exception is warranted here.

II. THE USE OF PRIVATE ACTORS TO ACCOMPLISH PUBLIC GOALS IS WELL ESTABLISHED IN THE LAW OF EMINENT DOMAIN.

In seeking to condemn private property to accomplish public goals, the City is not doing anything new. Contrary to the petitioners' claims, the use of private actors to accomplish public goals is well established in the law of eminent domain.

In its modern form, the doctrine of eminent domain dates from the mid-seventeenth century. According to most commentators:

> The phrase 'eminent domain' appears to have originated with [Hugo] Grotius who carefully described its nature (Lewis on Eminent Domain, Section 3; Mills on Eminent Domain, Section 5; 1 Thayer, Cases on Constitutional Law, 945), and the power is universal and as old as political society.

Welch v. Tennessee Valley Authority, 108 F.2d 95 (6th Cir. 1939).

The doctrine has long been part of common law jurisprudence. For example, Blackstone clearly recognized

the existence of the power of eminent domain in his Commentaries on the Laws of England, where he stated:

> In [certain] cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification. . . . All that the legislature does is oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

Commentaries on the Laws of England, Vol. 1, p. 135 (1765).

Blackstone's description of eminent domain authority as exercised in England is helpful because, for all relevant purposes, it describes the law as it was understood in the colonies where condemnation was used by colonial legislatures for a wide variety of public projects. Specifically, "[e]minent domain was employed quite extensively in colonial and early America for purposes including but not limited to mills, private roads, and the drainage of private lands. There was little disagreement that these uses were public and that eminent domain could be used in their assistance." Nichols on Eminent Domain, § 7.01[3] (3rd ed. 2004). However, this same treatise continues, "As demands for government support of commerce increased, so did controversy surrounding what constituted a valid public use justification for the employment of eminent domain." *Id.*

The reason for this controversy lay in the recognition that, while the power of condemnation was widely accepted

as a necessary incident of government, it was also recognized as being a direct potential threat to property rights. This tension, between the need for government to have the power of eminent domain and the need to protect the property rights of individuals, was reflected in the debates surrounding the Bill of Rights, specifically in the Federalist Papers, *e.g.*, The Federalist No. 10, at 104-09 (J. Madison) (Hamilton ed. 1868), and formed the backdrop for the eventual adoption of the Fifth Amendment.

Ultimately, the Framers drafted the Fifth Amendment with language that evinces a clear effort to provide government the power that it needed while protecting the property rights of citizens. The amendment expressly permits governmental condemnation of private property, as long as it is for a "public use," but explicitly requires "just compensation."

The term "public use," however, is not defined in the Fifth Amendment and a review of the caselaw suggests that, during the early stages of the Republic, the power of eminent domain was confined to certain traditional areas, such as taking land for governmental buildings, military installations, and roads. This use of the power of condemnation did not engender much controversy.

As one example, transportation projects have long been recognized as the type of activity which benefits from governmental exercise of the power of eminent domain. *Rindge Co. v. County of Los Angeles*. 262 U.S. 700, 706 (1923); *see also, Guam v. Moylan*, 407 F.2d 567, 567-68 (9th Cir. 1969). In *Rindge*, for example, the landowners objected to the taking of their property for two proposed highways that were to be built entirely on their private property. This Court upheld the condemnation as being for

a public use: "That a taking of property for a highway is a taking for public use has been universally recognized, from time immemorial." *Id.* at 706.

As times changed and technology advanced, new forms of transportation appeared, such as the railroad. Railroads offered new efficiencies in national transportation, but required vast amounts of capital and technical experience, both of which were difficult for government to obtain. Congress, and the state legislatures responded, first, by expressly recognizing the public need for railroads and second, by granting ***private*** companies the power of condemnation to build them. The courts uniformly upheld these developments in the law of eminent domain. *See, e.g., Hairston v. Danville & Western Railway*, 208 U.S. 598, 600-01 (1908).

Finally, in the last sixty years, this Court has upheld the acquisition of private land for new forms of otherwise typical government activities. The leading case in this regard is *Berman v. Parker*, 348 U.S. 26 (1954), in which this Court held that alleviation of severe urban blight could be a public use. The case involved a severely depressed slum where more than 50% of the dwellings were beyond repair and the public benefit from addressing persistent crime, disease and poverty were self-evident. Significantly, this Court upheld the constitutionality of the development act at issue, notwithstanding the fact that it permitted the transfer of acquired property to redevelopment companies or individuals to carry out the plan and, in fact, preferred the use of private enterprise over public agencies for execution of the plan.

Another significant case is *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 231 (1984). In *Midkiff*, authorities

in Hawaii acquired private land, not to address blight, but to break up an oligarchic land ownership system that resulted in an economic stranglehold on property. *Midkiff* is also very important for its conclusion that, for all practical purposes, the power of eminent domain is "co-terminous" with the state's police powers.

Finally, *Midkiff* and *Berman* are also relevant because they describe the standard of review used by the federal courts. Exercise of eminent domain is uniformly considered a legislative function and, therefore, courts have been very hesitant to interfere. As noted above, this Court has concluded that:

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-high conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

Berman v. Parker, 348 U.S. 26, 32 (1954). Consequently, courts defer to such legislative determinations and generally adopt a very circumscribed scope of review.[2]

[2] This is not to say that a legislative determination of public use cannot be challenged. As the Connecticut Supreme Court noted in this case, while "great weight" is accorded to a statute authorizing a taking, "the courts are empowered to resolve disputes when such determinations are challenged."

A review of the decisional law, therefore, demonstrates that government can employ condemnation to take private property, and even turn that property over to private hands, if required, in order to achieve a valid public use. Further, the legislature is the custodian of that power and the primary arbiter of what constitutes the public need. The logic is inescapable; if the end result is to address a public need lawfully identified by the legislature, then the fact that private versus public means are used to achieve that goal is constitutionally irrelevant. No state or federal constitutional provision has ever limited Congress or the legislative bodies of the several states to accomplishing necessary public projects solely through public instrumentalities. Furthermore, while the vast majority of cases involve noncontroversial cases where the public use is not questioned, such as roads, post offices, bridges, etc., this Court has upheld taking private land for more indirect governmental purposes such as removing slums or ending an oligarchic landholding system. In this regard, there does not appear, in any of these cases, any express language, or any logical reason, to limit the definition of public use to cases of blight as opposed to cases involving a distressed municipality. More importantly, the critical underlying fact is that it is the legislature, not any private party, that has, after due deliberation, defined the public need and has approved the means selected to attain it.

Consequently, what is before the Court in this case is nothing new. It is not a heretofore unrecognized expansion of the law of eminent domain because the use of private

actors to accomplish public goals is hardly novel but well established in the law of eminent domain.[3]

Furthermore, the decision whether the use of private actors to carry out development plans is a public use is a *legislative* determination. In the present case, the legislature has spoken, and very clearly. As discussed above, the General Assembly, in enacting Conn. Gen. Stat. § 8-186, clearly identified an unambiguous public need to address the crippling economic conditions of distressed municipalities.

In addition to the explicit definition of public use contained in the statute, the issue was again addressed when the City of New London sought to act under the powers granted it by § 8-186. Specifically, as noted above, in order to ensure fairness, full disclosure, and the protection of affected parties, the State legislature insisted that: 1) municipal authorities grant permission for the development agency to begin; 2) the agency present a publicly available plan which identified areas for potential acquisition; 3)

[3] The dissent in the Connecticut Supreme Court, as have courts in other jurisdictions, demonstrated clear unease with the use of governmental condemnation power for the benefit of a private company, but could not conclude that the legislature does not have the authority to enact such a law. As a consequence, the dissent below advanced an approach that would require clear and convincing evidence that a project would address a definable public need when land was being condemned for a private entity. While potentially useful as a judicial check on the misuse of the power of condemnation in particular cases, there remains the concern that using a higher level of scrutiny on certain cases contravenes a long tradition of deference to state and federal legislative bodies in matters involving determinations of public need. In this regard, there are, of course, valid reasons for deferring to the legislative process in these cases. Unquestionably, state legislatures, and not the courts, are best equipped to identify what is a legitimate public need and the means to address it.

public hearings be held; and 4) the municipal legislative bodies vote on the plan. Thus, not only has the State legislature acted to identify the public need in question, but the local authorities have agreed that there is a valid need, have developed a publicly available plan to correct it, and have voted on it. Finally, not only have the municipal authorities reviewed and approved the plan, but the Connecticut Department of Environmental Protection, the Connecticut Department of Economic and Community Development, the Office of Policy and Management, and the Southeastern Connecticut Council of Governments have conducted their own independent reviews.

The problems of persistently distressed municipalities are, clearly, a proper subject for legislative consideration and action. The Connecticut General Assembly, consistent with its obligations, examined the problem and responded with a carefully crafted statutory scheme to empower cities and towns to address a real and recognized need. The City of New London did not shirk its duty but, after providing full notice and an opportunity to be heard, designated an area for economic development, arranged for a plan to be drafted, and ultimately voted to act on that plan. This is what government does and, under the constitution, what government is given the power to do. After the government has done this, it would be anomalous, at best, for a court to step in and second-guess what state and local officials have determined is a pressing public need.

CONCLUSION

Eight centuries of common law have defined and established the limits of the power of government to take

property for the benefit of the public. It is beyond dispute that, without the power of eminent domain, government cannot act to accomplish the public good. The primary check on misuse of this power is, and has been, the legislative process. In this case, not one, but two, legislative processes are at work. The Connecticut General Assembly lawfully enacted a statute to permit municipalities to act to correct adverse economic conditions. The municipality, in turn, lawfully proceeded to create a development plan that comports with the statutes and the most restrictive notions of due process. There is nothing untoward, of itself, in permitting government to employ private parties as means to accomplish a desired end. Further, there is nothing constitutionally suspect in government seeking to improve economic conditions for distressed municipalities. Consequently, both the statute itself and the application of it in this case meet the terms of the Constitution and the Connecticut Supreme Court's decision should be affirmed.

Respectfully submitted,

RICHARD BLUMENTHAL
Attorney General of
Connecticut

*ROBERT D. SNOOK
Assistant Attorney General
Office of the Attorney General
of Connecticut
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5020

*Counsel of Record

Counsel for the State of Connecticut as Amicus Curiae

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